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**U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090**



**U.S. Citizenship
and Immigration
Services**

B5

DATE: SEP 26, 2011 OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink, appearing to read "Perry Rhew". Below the signature, there is a small handwritten note "per".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a web developer of multimedia applications. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, approved by the U.S. Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not meet the specified job requirements or qualify for the classification sought. Specifically, the director determined that the beneficiary did not possess the requisite education.

On appeal, counsel submits a brief and asserts that the beneficiary possessed the requisite education as of the priority date. The AAO will uphold the director's decision, finding that the beneficiary only possessed a three-year bachelor's degree, which is not equivalent to a bachelor's degree in the United States.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a U.S. academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a U.S. doctorate or a foreign equivalent degree." *Id.*

The beneficiary earned a foreign three-year Bachelor of Science degree in computer science from [REDACTED] University of Technology in Australia in 1998. Thus, the issues are whether those credentials qualify the beneficiary for the classification sought and meet the specified job requirements.

Eligibility for the Classification Sought

As noted above, DOL certified the ETA Form 9089 in this matter. DOL determines whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries Congress assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. Federal courts have recognized this division of authority. See *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

A U.S. baccalaureate degree generally requires four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

Visas shall next be made available . . . to qualified immigrants who are members of the professions

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244 is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that “[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor’s degree with at least five years progressive experience in the professions.” H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien “must have a bachelor’s degree” when considering equivalency for second preference immigrant visas. The AAO must assume that Congress was aware of the agency’s previous treatment of a “bachelor’s degree” under the Act when the new classification was enacted and did not intend to alter the agency’s interpretation of that term. See *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). In fact, the Senate Conference Report for the Act presumes that a baccalaureate is a “4-year course of undergraduate study.” S. Rep. No. 101-55 at 20 (1989). See also 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor’s degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 appeared in the Federal Register, the Immigration and Naturalization Service (the Service) (now U.S. Citizenship and Immigration Services (USCIS)), responded to criticism that the regulation required an alien to have a bachelor’s degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor’s degree:

The Act states that, in order to qualify under the second classification, alien members of the professions must hold “advanced degrees or their equivalent.” As the legislative history . . . indicates, the equivalent of an advanced degree is “a bachelor’s

degree with at least five years progressive experience in the professions.” Because neither the Act nor its legislative history indicates that bachelor’s or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor’s degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree (plus the requisite five years of progressive experience in the specialty). More specifically, USCIS will not consider a three-year bachelor’s degree as a “foreign equivalent degree” to a U.S. baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. Where the analysis of the beneficiary’s credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the “equivalent” of a bachelor’s degree rather than a “foreign equivalent degree.”¹ In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the “foreign equivalent degree” to a U.S. baccalaureate degree (plus the requisite five years of progressive experience in the specialty). 8 C.F.R. § 204.5(k)(2).

The petitioner submitted evaluations from [REDACTED] dated [REDACTED] November 30, 1999, from [REDACTED] dated July 26, 2008, and from [REDACTED] dated July 28, 2008.²

The AAO notes that the beneficiary’s diploma states that he completed his degree in December 1998. However, the beneficiary listed it as 1999 on the alien employment certification. [REDACTED] states that the beneficiary graduated in 1997, but [REDACTED] state that it was in 1998. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

¹ Compare 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (defining for purposes of a nonimmigrant visa classification, the “equivalence to completion of a college degree” as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

² The AAO was unable to verify that the “doctorates” claimed by [REDACTED] and [REDACTED] were based on education at an accredited institution. The AAO also notes that membership in associations that require only the payment of fees is not persuasive evidence of expertise.

[REDACTED] states that the beneficiary's program was accredited. He also asserts that the program required the completion of high school. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

[REDACTED] asserts that there are several three-year bachelor's degree programs at U.S. universities. The beneficiary did not attend a U.S. university, so the AAO does not find this argument to be persuasive. [REDACTED] states that she bases her analysis on the credibility of [REDACTED] University and the nature of the beneficiary's coursework.

The AAO notes that all three evaluators conclude that the beneficiary possesses the equivalent to a bachelor's degree in computer science based upon his three-year degree alone. None of the evaluators have provided any peer reviewed source to support their opinions. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817, 820 (Comm'r 1988).

The petitioner additionally submitted a report from [REDACTED] dated December 8, 2005, which discusses the equivalency of three-year Australian degrees in the United States. The AAO notes that the petitioner has provided no evidence that [REDACTED] has ever published this report.

Counsel asserts that the AAO should consider that Australian students complete thirteen years of secondary school before entering university level studies. Thus, Australian students complete the same number of years of study before receiving bachelor's degrees as students do in the United States. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190). The AAO notes that the beneficiary attended high school in Maryland in the United States so this discussion is moot. Furthermore, [REDACTED] instead stated that the beneficiary's bachelor's degree program only required the completion of twelve years of secondary school for entry. As stated above, it is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-592.

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

Id. at 591. The petitioner has failed to resolve these inconsistencies within the record of proceeding.

The AAO has reviewed the beneficiary's transcript for his Bachelor of Science degree in computer science from [REDACTED] University. The transcript for this three-year degree reveals that the beneficiary only took courses related to computer science and the Japanese language. Studies for U.S. bachelor's degree programs tend to be significantly broader, giving students a wider base of knowledge prior to entering their professions.

The AAO finds that the beneficiary's Bachelor of Science degree in computer science from Australia does not constitute the equivalent to a bachelor's degree in the United States because it was not four years in duration and the record contains no consistent, credible evidence establishing the degree's equivalency to a four-year baccalaureate program in the United States.

Because the beneficiary has neither (1) a U.S. advanced degree or foreign equivalent degree, nor (2) a U.S. baccalaureate degree or foreign equivalent degree and five years of progressive experience in the specialty, he does not qualify for preference visa classification as an advanced degree professional under section 203(b)(2) of the Act.

Qualifications for the Job Offered

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu*, 736 F. 2d at 1309.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien employment certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the alien employment certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in an alien employment certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the alien employment certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the alien employment certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the alien employment certification.

In this matter, Part H, line 4, of the alien employment certification reflects that a master's degree in computer science is the minimum level of education required. Line 6 reflects that no experience in the proffered position is required. Line 8 reflects that a combination of education and experience is acceptable in the alternative. A bachelor's degree and five years of experience is acceptable. Line 9 reflects that a foreign educational equivalent is acceptable.

The beneficiary possesses a foreign three-year Bachelor of Science degree in computer science from the [REDACTED] University of Technology in Australia in 1998. The beneficiary does not possess the foreign equivalent to a bachelor's degree in the United States.

The beneficiary does not have a U.S. master's degree or a foreign equivalent degree. The beneficiary also does not have a U.S. baccalaureate degree or a foreign equivalent degree followed by five years of progressive experience in the specialty. Thus, the beneficiary does not qualify for preference visa classification under section 203(b)(2) of the Act. In addition, the beneficiary does not meet the job requirements on the alien employment certification. For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.